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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

DARTMOUTH-HITCHCOCK CLINIC, ET AL	*	11-CV-358-SM
	*	December 8, 2011
v.	*	9:45 a.m.
NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES, COMMISSIONER	*	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE STEVEN J. MCAULIFFE

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: Court is in session and has for consideration a motion hearing in Dartmouth-Hitchcock Clinic, et al, versus New Hampshire Department of Health and Human Services, Commissioner, civil case number 11-CV-358-SM.

THE COURT: Now, as I recall -- Ms. Smith, how are you doing?

MS. SMITH: Good.

THE COURT: As I recall our discussion in chambers, you're just going to argue the law today and present evidence in January.

MS. SMITH: Correct.

THE COURT: All right. So far we're on the same page.

And then my law clerk and I had a little bit of a disagreement about Mr. MacDonald. I think I said to you 30(A) is up at the Supreme Court, let's wait and see what the Supreme Court says about it, and you agreed or disagreed?

MR. MACDONALD: Disagreed.

THE COURT: That's what he said. Okay. So you're going to argue 30(A) as well?

MR. MACDONALD: Yes, your Honor.

THE COURT: Okay. Attorney Smith, good

morning.

MS. SMITH: My understanding -- that's how I was going to start was by defining the scope of the hearing today. My understanding is we're presenting our arguments on the motion to dismiss, which is why I'm standing up here first, which is the 30(A) arguments, as well as the arguments we had on 13(A), which is in our objection to the preliminary injunction. And so both of those go to whether there's a cause of action.

MR. MACDONALD: So may I, your Honor?

THE COURT: You're lead counsel, Mr. MacDonald. Are you splitting it up or what?

MR. O'CONNELL: We are splitting it up. I will be arguing the 30(A) issues and MacDonald 13(A) and Chapman irreparable harm.

THE COURT: All right.

MR. MACDONALD: Just so I understand it on the 13(A) piece of this, we're presenting our arguments about whether Section 1983 provides a cause of action or not.

MS. SMITH: Correct.

MR. MACDONALD: Okay.

MS. SMITH: Just so we're clear on what the scope of the hearing is, there were some other legal

arguments raised in the preliminary injunction issues and the preliminary injunction objection and replies. I'm prepared to address those today, but if the Court just wants to focus on the cause of action arguments we can do that and save the other legal arguments raised in the preliminary injunction for later.

THE COURT: It's up to you.

Mr. O'Connell, you are going to argue 30(A) but not the supremacy 1983 issue?

MR. O'CONNELL: Correct. Well, 1983 -- to the extent it's argued in the preliminary injunction, Attorney MacDonald is covering it.

THE COURT: All right. Attorney Smith.

MR. MACDONALD: And just -- sorry, your Honor.

THE COURT: It's all right.

MR. MACDONALD: Just so we get the terms, I think it will benefit the Court, there was one other issue we discussed in chambers, your Honor, that we take up today. Mr. Chapman is prepared to take up the legal standard governing irreparable harm.

MS. SMITH: And we're prepared to address that. If you want me while I'm up here to address all three of them, I'm prepared to go ahead and go first. And then there are a couple of other legal issues that

we'll save until we see whether or not we're having a further hearing.

THE COURT: All right. Now I'm concerned about the court stenographer. What's your time estimation?

MS. SMITH: It depends on how many questions you have, your Honor.

THE COURT: Try to keep it to a minimum.

MS. SMITH: I don't think I have more than 20 to 30 minutes.

THE COURT: Okay. All right.

MS. SMITH: Turning first to the 30(A) Supremacy Clause issues regarding the first four counts of the plaintiffs' complaint which we address in both our motion to dismiss and our objection to the plaintiffs' preliminary injunction.

The plaintiffs concede that 30(A) -- and just to be clear, I'm going to refer -- that stands for 42 U.S.C, 1396(a)(30)(A), which we abbreviate to refer to as 30(A).

They agree that 30(A) as well as 1396a(b) and 42 C.F.R. 430.12 do not create a private cause of action. Rather, they argue solely that they have brought an Ex parte Young action, arguing that the state's actions taken for budgetary reasons violate

the Medicaid statute on their face and are therefore preempted by the Supremacy Clause.

Turning to the Ex Parte Young issue, the line of cases allowing parties to seek injunctions under Ex parte Young we submit depends on the nature of the action that the plaintiffs are seeking to prevent being a regulatory or statutory obligation imposing affirmative obligation on the plaintiffs that they are seeking to avoid.

That's the distinction between what they are attempting to do here and the pharmaceutical case versus Concannon, which was 249 F.3d 66, which was affirmed by the United States Supreme Court where there's no new affirmative obligation that the plaintiffs are seeking to avoid.

It's also significant in the Concannon case that the Court went on to find -- specifically find that there was no preemption under the Medicaid statute, and I'll talk about that more in my second part of this argument.

But Ex parte Young -- it's important to remember that Ex parte Young is a vehicle for creating an exception to sovereign immunity -- to the Eleventh Amendment sovereign immunity for the state, and it doesn't really create a cause of action in its own

right. And that was discussed in a case called -- it was Virginia Office of Protection and Advocacy versus Stewart, 131 Supreme Court 1632. It's a 2011 case. And they were very clear there that Ex parte Young is jurisdictional.

It doesn't really answer the question of whether there is a cause of action, and the Supreme Court just affirmed -- reaffirmed in that case that Ex parte Young does not apply where it would require -- where the result would be to have an impact itself on the state treasury or where it would interfere with public administration -- with the public administration of a program.

So those are some very -- and the recent Douglas versus Independent Living case up at the Supreme Court. If you read the transcript of the oral argument, it's very clear that the Court was struggling with the distinction between the Young line of cases and their jurisdiction prudence on requiring -- where there's an implied cause of action in trying to make those two bodies of law consistent.

We submit that these --

THE COURT: One of the questions was if you don't have a private cause of action but you have a Supremacy Clause 1983, then how can you not have a

private cause of action.

MS. SMITH: But you only -- let me go into those appointments because that's what I'm about to launch into in my next comments.

When there is a -- just one final point on Ex parte Young about the distinction between this being a regulatory or enforcement action that I think may help the Court understand that distinction is a concept that we came across that applies to commerce clause preemption cases where they talk about the concept of market participation. And that says that preemption doesn't apply to the state where it is acting as a market participant. In other words, where it is purchasing services rather than regulating. And that's another way to look at the distinction that we're drawing that may help clarify that distinction.

And some of those market participation cases are Department of Revenue of Kentucky versus Davis, 553 U.S. 328, a 2008 case.

So going back to Ex parte Young and the Supremacy Clause, what the plaintiffs are seeking to do here is to do an end run around a need for there being a cause of action. Because there's a number of cases that we have pointed out in our brief that say the Supremacy Clause itself --

THE COURT: You mean a private right of action.

MS. SMITH: A private right of action. The Supremacy Clause itself does not create a cause of action. You have to look at the underlying statute to see -- for there to be a cause of action. So they are expressly trying to do an end run around that very pointed lack of authority, which they concede. And as the Supreme Court pointed out in the Astra case that we cite, the absence of a private cause of action would be rather meaningless if they could simply do an end run around the need for a cause of action by recasting their claim as something else.

Going back to that point about the Supremacy Clause itself not creating -- being different than other constitutional claims where the Court has found that if there's a preemption claim that you automatically can bring this Ex parte Young claim. The Supremacy Clause is different than other constitutional provisions, such as due process, equal protection or the commerce clause because those clauses -- the right is under the constitutional provision itself. The Supremacy Clause is in a different section of the Constitution, and it is not a substitute provision. It's a jurisdictional

provision.

And again, for there to be Ex parte Young it creates an exception to the state's Eleventh Amendment to sovereign immunity and the question of whether preemption goes to the underlying statute.

So turning to the preemption issue -- and we present the preemption issue more in our objection to the preliminary injunction if you're looking for the section of our pleadings that brief that issue. But many of the cases relied on by the plaintiff for there being preemption, such as the Local 12004, or the Golden case, arise in the field of labor relations.

And there's a very large body of precedent on a national labor relations field that says that labor relations are uniquely suited for the purposes of federal preemption. And therefore we would submit that those cases really have little value outside of the realm of the National Labor Relations Act.

Secondly, the plaintiffs cite case law that points out that preemption is not to enforce litigants' private rights; yet we submit that is exactly what the plaintiffs are seeking to do here. They are very much seeking to force the state to pay them more money prospectively. They are not seeking to restore the balance of power that the Supremacy

Clause is concerned with between the federal government and the state, but they are seeking to protect their own body of law.

Going to the analysis of whether or not there is preemption, there are several different kinds of preemption that the cases talk about. The first is express preemption. And we would -- reviewing all of the pleadings, it doesn't appear that plaintiffs are claiming that there's any sort of express preemption. At most they rely on the standard preemption that's referred to as implied preemption. And there are two flavors to implied preemption.

The first is what's called field preemption. And in the Pharmaceutical Research Manufacturers Association versus Concannon, that's the 249 F.3d 66 First Circuit case which was also affirmed on appeal at 538 U.S. 64, the First Circuit explicitly found no field preemption intended by Medicaid laws in that case pointing out that very large areas of implementation of Medicaid law are very specifically left to the discretion of states and that the purpose of the Medicaid statutes are to advance a cooperative federalism between the federal government and the states, and that the purpose of Congress -- it was explicitly the purpose of Congress in leaving out a

wide range of permissible phrases to the states.

And they also went on in a Massachusetts case that we cite. In Re: Pharmaceutical Industry Average Wholesale Prices also points out that medical fee related regulations have traditionally been a field occupied by the states.

In the preemption strand -- that leaves the only basis for their claim of preemption being their claim that the various state actions obstruct federal purpose. And we submit that that simply doesn't carry the day for them either.

There is no conflict between the purpose of the Medicaid statute, which is to help low income or disabled people get medical care, and the state's interest in controlling costs so that it can continue to provide the broadest coverage of services possible and that controlling costs helps advance the purpose of the Medicaid statute without cutting services, and therefore it is consistent with the purpose of the Medicaid statute.

Going back to the discussions around repeal of the Boren Amendment, there was a lot of discussion that private lawsuits were driving up the costs of Medicaid. And I think there were some estimates in there that private lawsuits cost states over -- at

that point in time over a billion dollars and that also the private lawsuits interfered with the administrative process between CMS and the states.

For example -- and again, going back to the Concannon First Circuit case, that case found that Maine's prior authorization requirement did not conflict with the purpose of Medicaid even if it failed to advance the purpose of the federal program.

And turning to a case that I'm sure the plaintiffs will bring up, the recent Indiana lawsuit. In September of 2011 that District Court in Indiana vacated its prior TRO and denied a preliminary injunction basically finding that there was no conflict -- that there was no preemption under the Supremacy Clause. And that case involved an attempt to block the 38 percent rate reduction on broad dispensing fees.

Again, the case law on preemption repeatedly says that congressional intent is paramount. There's a recent case in 2009 that makes that point again, the Wyeth versus Levine case. That's at 555 U.S. 555, and those numbers are the same.

So when you look at the congressional intent -- and we're essentially right back at whether Congress intended there to be private rights of action

under 30(A). And the intent was that there not be was to put an end to provider suits. And again, that's clearest in the repeal of the Boren Amendment in which there were a number of statements that that was Congress's intent.

But it is also demonstrated by the language in 30(A) itself and the legislative history of 30(A) which requires that states' rates promote efficiency and economy, and that is to preserve states' flexibility to control costs.

And the legislative history of 30(A) -- it goes back to 1967, and there was actually -- and I didn't have all of this history cited in our pleadings, and I apologize for that, but the State of California in their brief in the Douglas case did do a legislative history of 30(A), and it goes -- as they state, that it goes back to 1967 and it was implemented as a cost saving measure to require states to safeguard against unnecessary utilization and therefore to help control federal costs.

So when you're looking at the purpose that 30(A) was initially adopted for, it was very much to --

THE COURT: But your argument isn't -- I didn't think your argument was we can just ignore the

federal statutory mandate in setting rates, we can just ignore all of the factors we're supposed to consider, and we can set rates based on our own fiscal convenience.

I thought your argument was if we violated the federal law in the sense that we didn't properly consider the factors we're supposed to consider, well, that's up to the Secretary to enforce.

MS. SMITH: That's also part of our argument.

THE COURT: It kind of has to be your argument, doesn't it?

MS. SMITH: Yes.

THE COURT: I assume -- you're not in here to say, look, we get to set the rates for our own fiscal convenience and that's the end of it, right? Are you arguing that?

MS. SMITH: Yes.

THE COURT: You are? Seriously?

MS. SMITH: We are arguing that rates --

THE COURT: The federal law is clear, right? I mean, the State of New Hampshire said, yes, we'll participate in this program and we'll do it under the rules that you set down. The rules you set down are we are going to consider a number of factors. We're going to balance the law of interests here.

You can't seriously come in and say, we said that we would do that but we don't really have to, and in fact we're not.

MS. SMITH: But within those factors we can still be --

THE COURT: I mean, if you stand here and argue, we have the power to set rates based upon our own fiscal interests, and the federal government, you know, be darned, we're not doing what we said we would do, then aren't you compelling the Secretary -- if there is no private cause of action, aren't you really compelling the Secretary to step in and say, oh, no, you're not?

I mean, how can you make that argument under the statute as its written? You're sort of daring the Secretary to step in and say, no, you really aren't free to do whatever you please. You've made a commitment under the law to do it a certain way. You can't stand up and say, look, but we're not going to do it and nobody can do anything about it.

MS. SMITH: I think we would agree that the Secretary can do something about it.

THE COURT: Okay. So the second half of the question is: Are you really telling the Secretary that we're setting these rates based on our own fiscal

convenience and for no other reason? Is that the judicial admission you're making this morning?

MS. SMITH: Budgetary reasons were certainly a factor, but the choices that were made taking into account all of the --

THE COURT: But the argument the plaintiffs are making is, it wasn't a factor. It was the only factor. It wasn't a factor among many. It was the factor.

MS. SMITH: As long -- it can be -- we would contend that it can be the sole factor but that it would be up to the Secretary to tell us --

THE COURT: Since we're on a roll, are you saying it was the sole factor?

MS. SMITH: We're not agreeing with that contention.

THE COURT: I don't know about that contention. This is the contention. Are you saying it was the sole factor?

MS. SMITH: No.

THE COURT: Okay. And what evidence is there that some other factor was considered?

MS. SMITH: That critical access hospitals rates were not reduced. And that was based on the fact -- that a number of these actions that they

complain about were -- critical access hospitals were exempted from them. And that was based on an evaluation of the financial stability of those hospitals, as well as a number of other factors about access, which shows that we were considering the factors that the federal program -- that the federal government says we were supposed to consider. That they had information about the financial stability of the hospitals before they made these decisions. That those were considered about whether or not this would have -- these changes would be so severe that they would have an adverse impact on access.

So there are a number -- that gets into the facts. I'm not saying those are all of the factors. Those are the things that we would be presenting in the evidentiary hearing. I think we covered a lot more of them in our pleadings, but those are the ones that come to mind today.

Did I address your question, your Honor?

THE COURT: You did.

MS. SMITH: Okay.

THE COURT: But we don't have to spend a lot of time on it. Well, it's up to you. But your position here is 30(A) doesn't create a private cause of action?

MS. SMITH: Right.

THE COURT: Section 1983, the Supremacy Clause, who knows. The Supreme Court is going to decide that this term.

MS. SMITH: Correct.

THE COURT: Do you want to move on to notes?

MS. SMITH: We hope they're going to decide it. If they decide it on extremely narrow factual grounds unique to the California case, there is the possibility that -- it depends on how the case comes -- you know, what they decide -- the facts that they say are controlling in that decision.

So to wrap up the Supremacy Clause issue -- and again, I will just -- to shorten the argument, the State of California in their brief to the Supreme Court in the Douglas case laid out the history -- the legislative history of 30(A) at page 29 to 30 of their brief, and we submit that when you look at the intent -- preemption looks at the intention of Congress, and the intent of 30(A) itself was to help the federal government and states control costs. So that's another factor, as the Court pointed out.

So we submit that there is not a private cause of action, and that's distinct from the jurisdictional question. And I think that was a

distinction that got lost in the Douglas argument, that whether there's a cause of action is distinct from whether the federal court has jurisdiction. And I think the Solicitor General in the Douglas argument tried to focus on that.

THE COURT: Really? I didn't think that was an issue. I looked at the transcript of that oral argument. There's no question it's a federal question jurisdiction. But that's not the issue. The question is, do you have a private right of action.

MS. SMITH: Right. Ex parte Young, though, is jurisdictional. And that's why I think there was some confusion in crossing those lines. Ex parte Young gives the Court jurisdiction where it wouldn't have it under the Eleventh Amendment.

THE COURT: Right. But that's not an issue here, is it?

MS. SMITH: Correct. But that's why -- I'm just saying Ex parte Young doesn't answer the question of whether there's a cause of action.

THE COURT: Okay. I think I follow that.

MS. SMITH: So turning to the 13(A) argument --

THE COURT: You're saying Ex parte Young doesn't give rise to some freestanding private cause

of action?

MS. SMITH: Right.

THE COURT: 1983 is just a vehicle. The Supremacy Clause you say doesn't give rise to a freestanding cause of action?

MS. SMITH: Correct.

THE COURT: The Supreme Court will decide that.

MS. SMITH: Correct.

THE COURT: And 30(A) you're saying doesn't give rise to a statutory freestanding private cause of action?

MS. SMITH: Right. And we believe they can keep it that way. They haven't argued that 30(A) gives rise to a statutory cause of action.

So I think that frames the 30(A) argument, unless you have other questions, your Honor.

THE COURT: No.

MS. SMITH: So turning to the 13(A) argument, which is in our objection to the preliminary injunction. And they argue that 13(A) gives them a cause of action under Section 1983.

It's interesting that 13(A) -- whether there's a cause of action under the Blessing/Gonzaga test is actually a more straightforward question

today. I'm aware that test is somewhat convoluted, but given the complexity of the 30(A) issues, the 13(A) question is a little bit more straightforward, or at least more well-trodden ground.

And we submit that the Blessing test as refined by the Supreme Court in Gonzaga indicates that there is not a private cause of action for either the providers or beneficiaries under Section 13(A). That it doesn't meet either of the first two prongs of that test where Congress has said that -- the courts have said that Congress has to have intended to benefit an individualized plaintiff. And what they've looked at is whether the -- it was referred to in the statute as an aggregate group or individualized rights.

And here in 13(A) when they're talking about the public process the group is indicated as providers, beneficiaries, or any other interested person. So it's really hard to think of any more aggregate group since that would be potentially everyone in society.

And the second part of the test is whether the public process -- whether what's being required by the statute is so vague and amorphous that courts would have difficulty crafting standards to enforce it.

And again, the public process leaves large amounts of discretion to the state. It's a flexible standard, and it does fit within that definition of being so vague and amorphous that it was not intended to create a private cause of action.

Looking at the case law since Gonzaga that has addressed this issue specifically, two circuits have addressed it, the Second Circuit and the Third Circuit. In New York Association of Homes versus DeBonis and Children's Seashore House, I think I've got those names correct, and both of those cases have rejected there being a cause of action under 13(A).

The only case that we are aware of that says there could be a private cause of action is from one district in Maine, and that's The American Society of Pharmacists versus Concannon found that there was a claim. That was not addressed in the Long Term Care First Circuit case.

THE COURT: I was going to ask you about that. I thought Judge Boudin in Long Term Care -- and my memory is fading now, but I thought the First Circuit just assumed that there was a 13(A) private cause of action.

MS. SMITH: Correct. They assumed it because they had an alternate basis which was much easier for

saying they didn't have a claim because pharmacists were not within -- they said pharmacists were not within 13(A) anyway, so they didn't have to do the analysis.

THE COURT: Well, they were saying pharmacists weren't within 30(A).

MS. SMITH: Right.

THE COURT: They weren't within 30(A). And then they said, this isn't like 13(A), where of course you would have a cause of action under 13(A). But not under 30(A) because you're once removed from a -- wasn't that it -- you're once removed from a direct provider?

MS. SMITH: Correct.

THE COURT: You're a supplier to a provider. The statute doesn't address suppliers to providers.

MS. SMITH: Correct. But they just assumed that --

THE COURT: It would seem to be that if you were a provider that would be different. You would have a 13(A) cause of action.

MS. SMITH: They didn't do the analysis to decide whether or not a provider would have 13(A). They just assumed for the sake of the argument that there may be a 13(A) claim.

THE COURT: Well, obviously I'll go back and read it again, but my memory was it was a little bit more than sort of off the cuff.

MS. SMITH: They didn't go through the Gonzaga analysis to determine whether or not --

THE COURT: Well, I think he did, actually. I think Judge Boudin made a point of saying that the problem that the closed pharmacies had in that situation was that the Supreme Court in Gonzaga had already tightened it up and said, don't come in here just saying somebody violated some federal law. That's not going to be good enough. You've got to come in here saying somebody violated a private cause of action that you are entitled to that we can listen to. That's 30(A).

This isn't like 13(A). 13(A), that would be different. If you were a provider, you would have a 13(A) cause of action. You probably wouldn't even have a 30(A) cause of action if you were a provider. Wasn't that the analysis?

MS. SMITH: We submit that they did not actually decide that.

THE COURT: Well, sure, you know, dicta holding, all of that, but the assumption was anybody analyzing this situation under Gonzaga would say, even

if you were a provider you didn't have a 30(A) cause of action. You're not even a provider. 13(A), that would be different, but you're not a provider.

MS. SMITH: We submit they didn't answer the question of whether there was a 13(A) claim.

THE COURT: Okay. Do you think they hinted?

MS. SMITH: They hinted, but they didn't address it and they didn't go through the full analysis. And two other circuits since then have and have rejected that.

THE COURT: But of course the First Circuit is where I take my primary guidance, right?

MS. SMITH: That's correct. We understand that.

So we submit that under the circuits that have directly addressed the issue there is not a 13(A) claim and that that claim -- so there would not be a likelihood of success on the merits of that claim, either.

THE COURT: Not that it's critical, but do you happen to know, are either of those up on cert petitions?

MS. SMITH: I don't believe either of those circuit decisions have gone to the Supreme Court. Was that your question?

THE COURT: Uh-huh.

MS. SMITH: I don't believe either of them have been appealed.

Turning to the last issue that the plaintiffs indicated they wanted to address that Mr. Chapman was going to talk about, the presumption of irreparable harm.

We briefed that in our surreply on the preliminary injunction. As I understand the argument, which was whether -- if you get to analyzing the equitable requirements for issuing a preliminary injunction, they claim that when you're trying to enforce a statute you don't have to show an irreparable harm. And we submit that the Supreme Court has indicated that even where you're trying to enforce a statute that traditional equitable principles apply, and we cited authority for that in our surreply.

I would also just point out that in the oral argument before the Supreme Court in the Douglas case the plaintiffs there were arguing that they had shown irreparable harm. So they certainly weren't raising a claim that they didn't have to meet that prong of equitable jurisprudence in a similar claim, either.

THE COURT: So the irreparable harm for Mr.

Chapman's clients is fairly self-evident, isn't it?

MS. SMITH: That's getting into the facts, and we weren't going to argue the facts today.

THE COURT: As a matter of law, isn't it self-evident that Mr. Chapman's clients could establish irreparable harm?

MS. SMITH: No. We believe they still --

THE COURT: I am severely ill. I could get treatment but for your actions. Because of your actions I can't get treatment. Money isn't going to fix that. I'm going to suffer some loss that's going to be irreparable. Why isn't that self-evident?

MS. SMITH: We are not aware of any allegations that Mr. Chapman's client has not been able to get treatment. It's just a conjectural possibility that has not materialized.

THE COURT: You're saying if he had a client that fit that description that would be different, but all he's got is a theory?

MS. SMITH: There are many doctors that will accept Medicaid. If the one that he has been seeing specifically won't, we will find him one that does. There are hospitals -- the Lakes Region Hospital --

THE COURT: That's an interesting point. Can you blunt irreparable harm by volunteering to

remediate it? I'm not sure you can, but maybe you can. I suppose if you're willing to do it then there's no irreparable harm, right? That's a pretty broad category of volunteerism.

MS. SMITH: The issue was whether or not -- a doctor is one issue, but what we're talking about here --

THE COURT: We're talking about patients.

MS. SMITH: And there's no allegation that he cannot be seen at the hospital that he's been going to. That hospital is the sole exception to Medicaid. If he needs to --

THE COURT: Right. We discussed that in chambers, right. You're saying it's a vote with your feet situation, and they're not voting with their feet yet.

MS. SMITH: Correct.

THE COURT: What if they vote with their feet? Then is there irreparable harm? Is then the argument, well, but there's some other hospital you can go to within some distance?

MS. SMITH: Medicaid doesn't require that every provider be enrolled in Medicaid.

THE COURT: No. Of course not. But to a Medicaid patient, as I understand it, you're supposed

to be setting the rates and managing the system in such a way that reasonable medical services are available for people that otherwise couldn't afford them.

So you can't shut the system down and say, well, you know, Arkansas has hospitals, why don't you go to Arkansas, right? You can't do that. It's got to be in New Hampshire and it's got to be services reasonably available and the system has to be operating in such a way that that's a reality, right?

MS. SMITH: Yes.

THE COURT: So at some point I guess the reality is there is irreparable harm because a patient can't get medical services and would suffer losses that money is not going to compensate for.

MS. SMITH: At some point there certainly could be.

THE COURT: And what you're saying is right now he doesn't have a client that fits that profile.

MS. SMITH: Correct.

THE COURT: Okay.

MS. SMITH: And I think I concluded my primary presentation. And depending on any arguments that are presented that I haven't anticipated, I guess I would like an opportunity to --

THE COURT: Yes. Certainly. Absolutely. Thank you, Attorney Smith. I appreciate it.

MR. O'CONNELL: Good morning, your Honor. Scott O'Connell.

THE COURT: Good morning, Mr. O'Connell. How are you doing?

MR. O'CONNELL: Thank you for the opportunity to argue the 30(A) issue. I would limit my comments to that.

Three principle points. The state relies on arguments that have been tried recently in three different forums and rejected. And they've been rejected because the notion -- or the construction of Ex parte Young that the state wants to rely on is just not supported by law, and it's based on a fundamental misapprehension of what this case is about.

It is not a cause of action for money damages. And throughout the state's papers you will look at that stalking horse argument and try to take our case -- and I'll describe our case in a minute -- and turn it into something it's not.

There is a piece of our case that Mr. MacDonald will argue, and that is the private cause of action. But the first four claims deal with the supremacy of federal law and constrictions and

restrictions on the State of New Hampshire to comply with that law.

And it's our contention that by passing law RSA 126 that provides for the changes to the Medicaid reimbursement program for the financial convenience of the state is in violation of federal law.

And we don't argue for a second -- and I just want to clarify a couple of things because I think these concepts get muddied through the pleadings. Ms. Smith is correct. We are not claiming that our ten possible provider clients have a private cause of action under 30(A). Let's just get that out of the case right now. That's not what we're here to say.

We are here to say that for more than a hundred years it has been the law of this country under Ex parte Young that when a state tries to contravene by its laws federal supreme law of the land, then an Ex parte Young action exists. And it exists as a matter of affirmative law or defensive law. And I can go through that. It's in our papers.

But let me address the first issue you put on the table which is --

THE COURT: It's an interesting argument, but isn't one of the major flaws that the federal law that you're talking about is a federal law that says, and

if you don't comply the Secretary will make a decision as to what sanctions to impose, and you know, may kick you out, may stop funds, may do all kinds of other things in an effort to try to work this out and make this system go?

MR. O'CONNELL: Yes.

THE COURT: And so that's the remedy and that's the law. So incorporated in the law is this notion that it's not just, you must do this. It's a combination of things. You must do this or the Secretary might do that. And you're in here saying, no, no, no. It's just a you must do this, and I'm here as a citizen with an Ex parte Young injunctive cause of action to make you do what you said you would do.

But what the state said they would do is, we'll do this and we'll suffer the consequences that the Secretary might decide to impose if he or she doesn't like what we're doing, and you're forgetting that part of it, it seems to me.

MR. O'CONNELL: Not forgetting it. We recognize it, but that is not the case. There is no suggestion that that's an exclusive remedy in the regulations or the law, so that needs to be acknowledged in the beginning. You're absolutely

right.

THE COURT: I mean, I know you've thought of this so I can't wait to hear your answer. The Secretary decides, you know, it's an election year. New Hampshire has got a primary. I don't think I want to get up there and start pushing New Hampshire around over these things. Let's see if we can't mediate and cogitate and discuss and work it out, and you know, maybe come 2013 we'll talk about it in serious terms.

And in comes Scott O'Connell and says, well, that might be okay for the administration of the federal government, but I want to enforce this mandate right this second. That kind of messes up the congressional intent on federal comity and let's work together and let's not get ugly with each other if we don't have to.

So why would Congress want that to be the end result? And why would Ex parte Young say whatever Congress wants, so what, Scott O'Connell gets to do that?

MR. O'CONNELL: I'm sure they weren't thinking about Scott O'Connell. That's for sure.

THE COURT: Well, as a representative of the litigant.

MR. O'CONNELL: I do recognize that, your

Honor.

A couple points in response, because we have thought about this at great length. There are very limited remedies under the CMS regulation. One is to just stop the funding of the so-called nuclear option. That effectively does a body blow to the entire healthcare system of the state. It's been invoked once that we know about in Missouri. Not a very effective vehicle for the type of mediation and control that you're talking about, point one.

Point two is that at the very primal level here, in order to get some type of oversight by your regulator, you have to submit yourself, your plans and your methodologies to the regulator.

The record before you is replete. And I think this starts to feel like the injunction argument. I will address it now, but I think Mr. MacDonald will address it as well in some fashion.

The state has taken the position since 2008 that no plan amendments that detail the change in state law that conflicts with federal law needs to be given to the administrator. So they have created a closed loop ecosystem where they make the rules. They're not accountable to me under the hypothetical we're talking about on behalf of the providers. And

they're not accountable to the regulator because they haven't told the regulator they changed the rules. That's a pretty good system.

So I guess there is a set of facts that we could contemplate. And these were some of the arguments that the Supreme Court had colloquy on in the Douglas case, which is there is a rule for deference to the administrator, absolutely, and that is the federal system here. And that has been charged with the relevant information and expertise to make some of the judgments I think that are built into your hypothetical, but necessarily they've got to bring those plan evidence forward so that the regulator's jurisdiction is invoked. They haven't done that.

The changes that are imbedded in RSA 126 which talk about balancing the budget and making reimbursement changes to meet that financial convenience have never been tendered to CMS.

And so we are left with the Ex parte Young vehicle, which I'll note for the Court the Douglas case found this cause of action. The Rell case in Connecticut found this cause of action. That went up to the Second Circuit and got dismissed because it was found in that case -- and I just want to note the distinction there. If you read it, you'll see there

was no procedural violation of 30(A) found in the Second Circuit, and that's the conflict between the Ninth Circuit and the Second Circuit on the procedural issue, part of which will be decided by the Supreme Court.

But it got to the Second Circuit because they found an Ex parte Young cause of action. And most recently in Indiana the same issue. The Court there -- and we've cited this in our papers but I'll paraphrase -- said, we know the Supreme Court is taking up this issue, but it would be a gross departure of a hundred years of law to deny these providers the cause of action for declaratory relief. And until the Supreme Court tells me otherwise, I'm going to proceed and make a decision.

So I guess if we had a different set of facts and we had a state that was fully transparent on what it was doing with its regulator there might be an argument, but that's not our case.

So in this set of circumstances where the state has not amended its plan there is no regulatory oversight to be deferential to. And so we get back to what is this case about. It's not a cause of action for damages. It's saying, State of New Hampshire, apply federal law. It is the law of the land. You

are a voluntary participant in this federal program. For every dollar you raise and spend you get a federal dollar, and you've got to comply with the rules. And one of the rules you paraphrased. You've got to ensure a delivery system that ensures equal access to those in the Medicaid plan and you have to think about that when you make changes. And if you don't think about that, that's a violation of law.

And all we are saying -- and again, getting the stalking horse issue out of here -- is don't write a check to any of our ten clients because we're showing you a damages claim. We're simply saying, you've got to throw that law out to the extent it is preempted by federal law. And let me get into preemption for one minute.

THE COURT: Well, you're not saying -- well, maybe you are. You're not saying that 126 is preempted.

MS. SMITH: Yes.

THE COURT: You're saying the content of 126 wasn't submitted to the regulator as a plan amendment.

MR. O'CONNELL: We're saying both. Well, we're saying three things. On its face 126 is preempted because it conflicts with federal law because it doesn't mirror the federal requirements.

For example --

THE COURT: Why doesn't it? It's a very narrow focused factor, if you will. As Attorney Smith argued, it's a factor among many. It's not necessarily the factor.

MR. O'CONNELL: If you read 126, I would submit to you it's the factor -- the only factor the state considers.

THE COURT: You would read it in connection with the state's Medicaid plan and in connection with federal law that requires the plan to consider a certain amount of factors. Wouldn't you read it all together? It wouldn't be in isolation.

MR. O'CONNELL: Yes, I guess. But under normal statutory construction you want to rationalize the whole constellation of relevant laws. You're absolutely right. However, if you read it, it says that the commissioner of HHS if they need to balance the budget can make changes and submit it to Joint Fiscal. None of the 13(A) arguments need to be complied with going with notice and compliance, and they can just balance the budget based on that.

So I would submit -- and when we get to the evidence in the injunction -- and again, here we are on a motion to dismiss. So fortunately for the state

the Court is going to assume that we plead this accordingly, but the facts you will hear is that the only thing the state considered was balancing the budget. The only thing. They did not look at the delivery system. They did not look at the impact and access issues. It's just an absolutely vacant record.

So if we're right about that -- if the evidence is going to be that, we've at least got an as applied challenge to 126 as being preempted. We think there's a direct facial challenge and you cannot reconcile the limitation of that language with the 30(A) ending.

It's possible that without following the strictures of 126 they could ultimately comply with 30(A), but that's by accident, not by design.

THE COURT: I apologize for going back, but you made an interesting point. Would you change your view if 126 was made known to the regulator, the federal regulator, saying, oh, by the way, we're going to amend our state claim and note in our state claim that we have RSA 126, and on occasion RSA 126 may dictate the rate changes. Then would you agree it's kind of up to the Secretary at that point? There's no federal preemption because all federal law requires is that you note the elements of your plan so the

Secretary can make sure they conform and take appropriate action if the Secretary thinks that they don't.

MR. O'CONNELL: A couple things are buried in that hypothetical that I will just squirrel out.

THE COURT: It's interesting. It's unique, obviously, in respect to you don't usually have a state saying we have a plan and we're going to do all these things, but we have a side deal just among ourselves that we're not -- but if you tell the regulator, oh, by the way, our plan is we'll do all these things, except which we don't.

Isn't it then up to the Secretary to decide, is that consistent, is that inconsistent, what sanctions, what actions should I take in terms of enforcement? You wouldn't then have an Ex parte Young challenge, right?

MR. O'CONNELL: We wouldn't have an Ex parte Young challenge on the fact that this conflicts with federal law in this respect.

Let me back up for one second. 126 has been disclosed to the Secretary but the changes --

THE COURT: Well, you know, of course it's public law. Everybody is instructively aware of it.

MR. O'CONNELL: Right. There's that, okay,

and there's this reference in the state plan to a prior version.

The problem is it was amended to allow for this budgetary driven end result, which is if you don't have enough money you can make the changes for the convenience of the state to balance the books.

THE COURT: I take your point, but as I said, it's kind of unique. But assume the state plan is -- it's the state plan. But the last element of our state plan, Mr. Secretary and Ms. Secretary, is when we want to for budgetary reasons, and solely for those reasons, we will reduce the rates, and that's our plan.

MR. O'CONNELL: If that had happened and if the state had -- if CMS had passed on that without any guidance. The way that process works is you tender it and CMS usually says, we'll agree to that as a ground rule, or no, it's not acceptable.

If we had those sets of facts, then the next stage we would be at is, okay, when you did your budgetary changes did you also comply with the other requirements of 30(A).

It's one thing to disclose it to the Secretary and say, we're not going to do this, and say, okay, we think under certain circumstances that's

okay, but have you done the analysis and have you on a substantive basis ensured that whatever changes you make will provide equal access to Medicaid patients, and that still is a cause of action that's very much alive in this case.

And at the end of it, it is our burden to prove that substantive case. That's not what we're here to do today. The question is what's the cause of action.

THE COURT: Before I confuse myself -- I know I'm not going to please you, but before I confuse myself, what you're saying now is the basic problem here is the state plan does not admit of RSA 126. It's an off the reservation controlling factor.

MR. O'CONNELL: Absolutely.

THE COURT: And, therefore, there might be Ex parte Young injunctive cause of action with respect to that statute.

MR. O'CONNELL: Absolutely. Absolutely. So let's build out that hypothetical some more. 126 gets amended. It says that we can take these actions. We have one bucket of money, but if we have more claims than necessary we're not going to worry about what the services are that we're going to deliver. We're just going to cut that pie into really small pieces. And

so you don't get 50 cents on a dollar as a provider. You get 30 cents on a dollar.

The question is, what does that do to the delivery system. Can you vote with your feet? And is that the policy choice that the state is making?

I'll submit when you hear the injunctive relief one of the providers did vote with their feet, told the state that they were not going to be accepting Medicaid patients, and the state responded by asking the attorney general to investigate whether or not the healthcare system was complying with its mission.

So it's really a false choice. Vote with your feet, but we're going to come after you and investigate you and bring the full force of the state against you. That's a Hobson's choice. That's not an acceptable choice.

So voting with your feet given that reaction that's happened in the context of this case, together with how the requirements work, you know, protecting life and limb in emergent situations, make it very complex. I think a fair minded person would say no healthcare system can simply vote with their feet. There are many strings that are attached to this. But again, that's for the injunctive argument.

Coming back to your very important questions about the law here. So if we have a 126 which says that a factor could be the budget convenience, okay, we still have a cause of action if substantively the state hasn't done an analysis to determine what the impact would be, or we can show through John Does or through other evidence that we bring forward that the choices made are not complying on a substantive basis with 30(A), and those are the two pieces of this case.

We realize that's our burden. We have to bring that forward and we'll do that, but that is not the issue today. The issue is whether there's a cause of action.

And the three cases -- again, I referenced this before -- have already decided this. And I'll point you to the First Circuit, too. One of the arguments that you didn't hear from Ms. Smith a moment ago, but it's in her papers, is that Ex parte Young only applies in a defensive circumstance when the state is coming after you, and that's just not the law. Local Union, a 2004 case, makes quite plain, a claim that a state regulation is preempted by a federal statute need not always arise as a defense when injunctive relief is sought against state officials.

So it is an equitable remedy that is to ensure that federal law when it's being transcended in a conflict situation will apply.

So I guess I would submit in answer to the question that you gave me about 15 minutes ago: Mr. O'Connell, do you have the ability to come here and make these arguments under Ex parte Young? I would say yes. To the extent that state law as written or as applied conflicts with any federal law, Scott O'Connell, Gordon MacDonald, anybody in this courtroom has the ability to come in here and say, Judge, please look at the conflict here and determine that the state law is inappropriately being applied, transcends into supreme law of the land, and make it null and void. And that's what our cause of action is.

THE COURT: Thank you. I appreciate it.

MR. O'CONNELL: Thank you, your Honor.

THE COURT: Mr. MacDonald.

MR. MACDONALD: Good morning, your Honor. Thanks for your time today. I'm here to talk about Counts 5 and 6 of the plaintiff's complaint. Those raise -- those counts seek to enforce the plaintiff's rights under Section 13(A) of the Medicaid Act.

And I know the Court is very familiar with Gonzaga/Blessing, and I think, your Honor, I would

just like to pick up on your colloquy with Attorney Smith with respect to the state of the law, particularly in this circuit. And it's obvious that the Court has read the First Circuit's opinion in the Long Term Care case. Chief Judge Boudin -- chief judge at the time. Judge Boudin, Judge Lynch and Judge Lipez were on that panel. And the Court is absolutely right that that case came up to the First Circuit presenting both 13(A) and 30(A) claims. And the actual holding in the case is that the 30(A) claim did not give rise to a cause of action under Section 1983. This is a post-Gonzaga case. And in that holding the circuit had to overrule its prior case in the Bullen case.

The second part of the case dealt with Section 13(A), and the Court was -- your Honor is absolutely right. The distinction there is that the plaintiff in the case, a set of closed pharmacies, were not covered under Section 13(A). Section 13(A) grants rights to hospitals and nursing care facilities, and Judge Boudin ultimately held that a closed pharmacy, even one serving a nursing care facility, did not have rights under --

THE COURT: That was not a nursing home.

MR. MACDONALD: Exactly. But the case

warrants very careful attention. And your Honor said, well, the First Circuit gave us some hints. And if I may, your Honor, I think the hints are overwhelming.

Judge Boudin wrote, "Broadly speaking, subsection 13(A) requires something on the order of notice and comment rulemaking for states in their setting of rates for reimbursement of hospital services, nursing facility services, and services of intermediate care facilities for the mentally retarded provided under the Medicaid Act".

Another quote, "Subsection 13(A) does provide notice and comment rights as to rates set for nursing facility services". And as we know under Gonzaga, that is the touchstone; does the statute create a right.

Judge Boudin, another section of the case, "Subsection 30(A), unlike subsection 13(A), has no "rights creating language" and identifies no discrete class of beneficiaries". And this goes to the point you were making with Attorney Smith.

Another part of the case -- in making the distinction between providing notice and comments for rates as to nursing facilities and not pharmacies, the panel observed that Congress "could have thought that embattled care facilities like hospitals and nursing

homes needed special protection from arbitrary rates but that ordinary pharmacies did not".

And finally, your Honor, in this case, "It is easy to imagine why Congress wanted special protection for care facilities. Their sunk-cost structure makes them especially vulnerable to slow destruction by long-term underfunding; by contrast, the market reaction is likely to be quick and decisive if the Commonwealth seeks to underpay for drugs".

One other case that's very important for the Court's consideration, another First Circuit case both parties cited, is the Rio Grande versus Rullan case. It's a case that came up from Puerto Rico. It dealt with interpreting another section of the Medicaid Act and ultimately concluded that another section of the Medicaid Act dealing with reimbursements for federally qualified health centers did give rise to a Section 1983 cause of action. That decision written by Chief Judge Lynch. And Judge Howard and Judge Campbell were on that panel.

I would direct the Court's attention to -- she does a survey of the law post-Gonzaga in the Medicaid context in this circuit, and she notes the Long Term Care. She notes another case called Brighton (ph.) which dealt with another section of the

Medicaid Act. But in talking about Long Term Care -- and this is footnote 11, your Honor -- she says, "In the same opinion --", referring to Long Term Care. "In the same opinion, however, the Court assumed that a different provision, Section 13(A), was enforceable under Section 1983 because it contained "rights creating language" and was narrowly written with a discrete class of beneficiaries in mind."

So Attorney Smith properly points out to the Court that this is dicta, and certainly I would acknowledge that, but I would respectfully suggest to the Court that there may be degrees of dicta and here we have four of the --

THE COURT: Only if you want to use it, I suppose.

MR. MACDONALD: Well, as a practical matter, you have four of the six active judges essentially acknowledging that Section 13(A) creates rights creating language and is narrowly tailored and speaks to an individualized rather than an aggregate class of beneficiaries. And those are two of the three prongs that Judge Lynch lays out in the Rio Grande case.

The third prong, and this is something that Attorney O'Connell --

THE COURT: Is there much law out there on

the difference between aggregate and individualized beneficiaries?

MR. MACDONALD: It's a gloss that Judge Lynch -- you know, I first saw --

THE COURT: What does it mean, I guess?

MR. MACDONALD: I think as a practical matter it is --

THE COURT: If you say all firemen, is that aggregate of all firemen?

MR. MACDONALD: Well, let's just take it in the context of this case. The State's argument is that the language of Section 13(A) suggests aggregation because it applies to --

THE COURT: Well, any interested party.

MR. MACDONALD: -- any interested party. On that point, your Honor, I would point the Court to the Concannon case, the case decided by Judge Singal in Maine, and he directly addresses this. It's a very interesting case. It came literally weeks after Gonzaga. And he said, no, you can't read the other interested citizens to mean everyone in the state. It is modified by the language before it.

In other words, we're talking about rights going to providers, beneficiaries, their representatives, and other interested parties in the

state. I'm not quoting it exactly, but that's the essence of the language. And the district court in Maine said --

THE COURT: Meaning somebody like a provider.

MR. MACDONALD: Exactly. Exactly. And I would submit that's the guidance for this Court on that issue.

In any event, you know, I think you have this fairly compelling description of --

THE COURT: The easy answer is that's not us anyway.

MR. MACDONALD: Right. I mentioned the Concannon case. One other case that's very worth the time to take a look at is the underlying district court case of Long Term Care. Judge Tauro granted an injunction. Interesting facts. The Mass Department of HHS noticed on their website an intent to reduce certain pharmacy rates on March 17th, effective April 1st, and Judge Tauro applied the Concannon case and ultimately determined that there was a cause of action obviously under Section 1983 for both 13(A) and 30(A).

The facts though -- and then he went on to reach and grant an injunction. And the facts there are interesting, which are that he granted the injunction on the basis that an emergency rule was

insufficient to meet the requirements of Section 13(A), and he went on to note that the statute requires the ability of the protected parties to have an opportunity to review and comment rates before they go into effect. And obviously it was that decision that went on up to the First Circuit and was reversed.

But I would submit those four cases from this circuit should guide your determination of the issue under Section 1983.

Attorney Smith is quite right, there is a line of cases arising from the Second Circuit which reaches a contrary conclusion. I would invite the Court to look at the -- do the forensics on it, go back to the first case under that line that was decided, it's a case out of the northern district, and you will not see a really meaningful analysis under Gonzaga. And the district court judge there really does not apply the Gonzaga analysis. With respect, it's sort of a cursory determination.

That goes up and its affirmed in three paragraphs by the Second Circuit. No meaningful analysis. And then two other district courts in the Second Circuit, one in Vermont, and the Rell case which Attorney O'Connell referred to sort of summarily apply their circuit law, as abbreviated and cursory as

it was.

Getting to the application of the test: Does Section 30(A) have rights creating language? I think Judge Boudin and Judge Lynch are absolutely correct. It does. It provides very specifically and in clear, understandable and, very importantly, enforceable terms what needs to happen. It needs to be a public process. The state needs to publish rates. It needs to publish the methodology and it needs to publish the justifications. Then providers, beneficiaries, other interested parties, need to have the opportunity for reasonable comment -- a reasonable opportunity for comment.

Then the state needs to republish the final rates, republish the methodology, and republish the justifications presumably based on the information they've gotten from the comment.

THE COURT: If the state were to -- if I were to hold, you're absolutely right, they've got to do that, injunctive relief issues until it's done, and they do it and what they say is, these are the rates, the methodology is RSA 126, this is what we're going to do, let's have your comments. You comment and you say, oh, boy, that would be contrary to the requirements of federal law. You say thank you very

much. Here's the rate. Then you don't have a 13(A) cause of action at all, right, because the process has been satisfied?

MR. MACDONALD: I would agree with the Court.

THE COURT: Okay.

MR. MACDONALD: But they have not. The state simply has not done that. And very importantly, your Honor, Section 13(A) has a specific requirement for hospitals, as opposed to nursing care and intermediate area care facilities. They need to articulate how the rates serve those hospitals which provide a disproportionate share of care to the needy -- the low income population.

We've talked about -- so the tests are rights creating language, very clear and, importantly, enforceable. Courts do this all the time. This is in the realm of a due process, APA type remedies. Was there -- did they publish the rates? Did they publish the justifications or not? I mean, it's clearly enforceable.

THE COURT: You know, I'm probably jumping ahead, but just because I'll forget, why don't we do it now. Did we agree that we were going to hear legal arguments on the motions to dismiss? We're going to defer evidence on the preliminary injunction till

later, but did I understand that there's really no dispute about the facts relating to the 13(A) claims?

MS. SMITH: They claim no notice. We claim there was notice. So, yes, there's a dispute.

THE COURT: Okay.

MR. MACDONALD: I would suggest, your Honor, that I think that we could work together to come up with a stipulated record about what actually happened and sort of -- and hopefully cut down on sort of the tedious evidence with respect to that.

THE COURT: I was just asking procedurally. That's deferred to January?

MR. MACDONALD: Yes, your Honor.

THE COURT: Hopefully you can work it out, but if you can't you will put on evidence on what notice was given, if any.

MR. MACDONALD: Exactly, your Honor.

THE COURT: Okay.

MR. MACDONALD: So rights creating language, individualized versus aggregate, and finally, is there an effective enforcement mechanism. And again, this is something that Attorney O'Connell got into.

There are two enforcement mechanisms as a practical matter under the Medicaid Act. One is to disapprove a state plan, and two is to cut off

funding. Neither apply in this situation.

The state has claimed that as to a vast majority of the rates at issue in this case they don't need to submit a state plan amendment to CMS. That it's perfectly -- they're perfectly authorized to do so under the existing state plan.

And as Attorney O'Connell suggested, the second remedy, cutting off funds, is so blind as to be meaningless. I mean, it puts the federal government in a position of cutting off care as an effective matter to the entire Medicaid population.

So this statute is uniquely enforceable to Section 1983. And indeed its purpose is so important that to cut off an enforcement through 1983 would really be undermining what was clearly --

THE COURT: But you're talking about judicial remedies here. The cut-off of funds is a remedy reserved for the Secretary.

MR. MACDONALD: Correct. But part of the test under Gonzaga is an analysis -- or at least under Judge Lynch's gloss under Gonzaga is what other enforcement mechanisms exist, and so I'm just -- what other enforcement mechanisms did Congress contemplate. And I'm saying here that they are ineffective.

THE COURT: Oh, I'm sorry. Ineffective.

MR. MACDONALD: Ineffective. As a practical matter, just so the Court knows, CMS would know one way or another whether the rates have been published and all of the hoops you have to jump through for Section 13(A) have happened or have not happened.

THE COURT: Why? I mean, why? It seems to me the Secretary at any time could step in and say, gee, I noticed you've published this statute, and I can't help but notice that it seems to be facially contrary to the federal requirements of the Medicaid program. What do you have to say for yourself?

MR. MACDONALD: That could happen. But I'm saying there's no affirmative obligation on behalf of a state to tell CMS every time that it's going to adjust rates that we've noticed it and we've met all of the requirements of Section 13(A).

THE COURT: I missed that. All right. You better do that again. I missed that -- that point. You're saying the state does not have an obligation?

MR. MACDONALD: That's correct. Under 13(A) it doesn't have an obligation to tell CMS that, for instance, we are deciding to reduce inpatient rates by ten percent.

THE COURT: Right.

MR. MACDONALD: We've duly noticed --

THE COURT: You're saying under the statute that the state has enacted the state thinks it doesn't have an obligation. Is that what your argument is?

MR. MACDONALD: No. I'm saying just as a practical matter under existing CMS statutes and regulations there's no obligation for the state to tell CMS, to my knowledge, that it has published the rates and it's provided the methodology. In other words, it's completely self-enforcing. I mean, it's an obligation that the state takes on, but it's in no way meaningfully monitored by CMS. That's my point. Do you understand?

THE COURT: No.

MR. MACDONALD: Okay.

THE COURT: What's your -- your procedural argument, as I understand it, is that they are obligated to give notice. Anything that amends the plan or the effective enforcement of the plan that would be qualified as an amendment must be noticed. You've got to tell CMS so they can decide whether it's okay or not.

MR. MACDONALD: Correct. The state says that in reducing these rates they don't need to do that.

THE COURT: Oh, okay. You're not conceding they don't.

MR. MACDONALD: Absolutely not.

THE COURT: It sounded like you were conceding they had no obligation to.

MR. MACDONALD: I'm sorry, your Honor, but they don't. There's nothing that requires just think narrowly on 13(A) and the requirements of 13(A), providing notice and all of the different hoops that the state has to jump through before reducing or making adjustments on rates. The state is not obligated to tell CMS that in each individual instance it has done that.

THE COURT: Okay.

MR. MACDONALD: So CMS would have no knowledge whether the state is or is not complying with the public process requirements. That's simply my point.

So CMS is in a vacuum with respect to the 13(A) obligations, and therefore --

THE COURT: You're just saying that just adds to the notion of ineffective remedy -- the administrative remedy.

MR. MACDONALD: Exactly. Exactly.

The state makes a brief argument in its papers at least -- Attorney Smith didn't mention it but I'll mention it while I'm up here -- that somehow

the repeal of the Boren Amendment precludes a cause of action here. And I just -- I think that's an issue that was effectively addressed by Judge Boudin in Long Term Care. Whatever the repeal of the Borne Amendment did doesn't touch the rights -- the newly created rights under Section 13(A).

And the reference to the committee report language -- House Committee report language really doesn't support what the state is saying at all.

I would also respectfully suggest that the statute rather than the report language -- and the statute as interpreted by the First Circuit would control over the report language in any event.

But the point that I would leave the Court with is the architecture of what's supposed to happen here, which is the state decides it wants to make a change to the rates. 13(A) says we want to front-end that process. We want the state to reach out there and tell people what they're going to do and why they're doing it and receive data back so that they can make -- the state can make an informed decision. That's important to the process.

THE COURT: Well, that's what happened to Long Term Care. They adjusted the rate change that they were going with.

MR. MACDONALD: That's right. And it's so important to the process and underscores really the remedy we're asking for here, because absent this remedy that part of the process can't take place. There's no meaningful enforcement.

Attorney O'Connell described sort of the closed loop system that the state is trying to create here. They can raise or lower the rates, not tell CMS, not provide meaningful opportunity for notice and comment to providers, and not be subject to -- at least under 13 on either decision -- any meaningful judicial review. That is a complete closed loop, and that cannot be the law.

With that, your Honor, I thank you for your time.

THE COURT: I appreciate it. Thank you, Mr. MacDonald. Attorney Smith, any rebuttal?

MS. SMITH: Pardon?

THE COURT: You reserved time to -- oh, I'm sorry. Mr. Chapman. I'm sorry.

MS. SMITH: I was going to wait for Attorney Chapman to finish.

THE COURT: Thank you. I appreciate it. Sorry.

MR. CHAPMAN: Thank you, your Honor. May it

please the Court. The state in responding to the irreparable harm argument that is in our reply in support of the motion for preliminary injunction characterized it as a presumption of irreparable harm for lack of notice.

This morning in court the state characterized the argument as a presumption of irreparable harm for violation of a statute. That's not our argument.

In Long Term Care, the lower court decision that Attorney MacDonald referred to, the Court found that a violation of the federal Medicaid Act necessarily inflicts irreparable harm upon the persons that the act was designed to protect. And the Court cited the Virgin Island case, a Third Circuit case that talked about the body of law that provides that a violation of a statute that harms the public is a violation for which the Court can find irreparable harm.

And here we clearly have a program that Congress intended benefit the most needy people in the country who need medical care, the Medicaid program. This is a public statute that protects the public. It's the kind of statute that the Third Circuit was talking about in the Virgin Island case.

Now, in response the state cites the Romero

case and the Village of Gambell case. Neither -- the latter of those cases, Village of Gambell, comes after the Virgin Island case. It says nothing about the Virgin Island case, so it's silent on that point.

This Court in a decision in the Nationwide Mutual Insurance, which we cite in our brief at page 18, footnote 15, commented on Virgin Island and the Long Term Care case as standing for the proposition that a violation of a statute that protects the public interest is irreparable harm.

The other point that I want to bring out -- and it's not briefed, and I have the cases for the Court and for the parties because we didn't know the State's position on the two Supreme Court cases. And what I've done is I've given the Court the Sierra Club v. Marsh, which relies in part on the Commonwealth of Massachusetts v. Watt. Both of these cases were authored by then Judge Breyer.

And I've highlighted for the Court's benefit, since we didn't discuss it in our brief, the sections of the case -- of the Sierra Club case that I think bear directly on the argument that the state was making, and it really is a supplementary argument that we made.

Essentially what Judge Breyer said is to

determine what harm is you need to look at the nature and the structure and the purpose of a statute.

And in the village of -- or excuse me. In Sierra Club he was dealing with the National Environment Protection Act, and he characterized that act as an act intended to ensure that decision makers, the administrators, have a sufficient amount of information before making a decision, before starting a chain of actions that would be hard to stop once they started.

That's the kind of statute that we're dealing with here, as Attorney MacDonald talked about. 13(A) is a process statute to ensure that state administrators are informed of the relevant information before they make an adjustment to the Medicaid rates. And failing to follow that procedure means that the administrators necessarily are not making an informed decision.

And almost as though he anticipated a case like this, in Sierra Club Judge Breyer talked about the state not spending a sufficient amount of money to do something and then trying to stop that process once it gets started. Here, by not following the process and by making a decision that has had the kind of fiscal impact on both the hospitals and potentially on

the Medicaid recipients, what happens? The hospitals begin a series of actions to try to adjust that are very hard to unwind. The state gets accustomed to a level of revenue that is very hard -- particularly in certain political circumstances -- to unwind.

That's the irreparable harm here. The failure to follow a process to lead to an informed decision. Thank you.

THE COURT: Thank you. I appreciate it, Mr. Chapman. Attorney Smith.

MS. SMITH: Just a couple of points. It is apparent from what has been said here today that the argument about irreparable harm that Attorney Chapman has just made only applies to their 13(A) claims, not the 30(A) claims. At least that was the argument that I just heard.

THE COURT: He probably disagrees.

MS. SMITH: I'm just going on what I just heard because he said it's about the process, and that is the 13(A) argument, not the 30(A) argument. So there's still on that argument definitely -- if we get to that point -- the need to show irreparable harm regarding the 30(A) claims.

On the 13(A) issues -- I have not had a chance to look at these. This is something that was

raised in the reply to the objection on the preliminary injunction, so we addressed what we thought the argument was.

If we come -- rather than having another round of briefings, I would suggest that we would like an opportunity to respond to these cases, if we have to come back in January, at that hearing rather than have another round of briefings.

THE COURT: That's fine. Actually, if you just want to be prepared in January, that's fine, too. I don't want to impose on you anymore writing than you've already undertaken.

MS. SMITH: I would propose that is the way you respond to these rather than doing it today on the irreparable harm argument.

THE COURT: I'll give you a chance to say you disagree.

MS. SMITH: Just to go back and pick up on a couple of points, Attorney O'Connell made the representation to the Court that RSA 126-A:3 is not in any way reflected in the state plan, and we contend that is not correct.

If there's an inpatient section of the state plan and an outpatient section of the state plan, sometimes they get -- I get them reversed, but in

1999 -- ever since 1999 I believe it was the inpatient section has contained in that section -- after they go through and talk about the whole DRG coding, DRG analysis that the price per point is based on, and then at the end it says that after you figure that out then what is paid is then subject to both a federal budget neutrality factor and a state budget neutrality factor.

And in 2006 there was a state plan amendment submitted regarding the outpatient piece, which is state plan 06-008, I believe, in our attachments. That says that outpatient rates are to be paid on a percentage of charges on an interim basis and that there are final payments based on a percentage of cost, and then it says that the department determines the percentage that will be paid.

So that leaves -- that inserted into the state plan what is in 126-A:3, that the payments will be based on a percentage that may fluctuate. So we submit that the state plan does reflect 126-A:3.

Another issue on that point -- and I think this was more -- Attorney Gordon said that the state doesn't tell CMS anything, you know, basically about what it's doing about rates and there's no obligation to do that. And in our surreply, page 11, we went

through an analysis of the federal regulations about requiring -- whether rates themselves are required to be in the state plan and pointed out the distinction between the requirement of what's in the state plan for the methods and procedure for determining the rates and the rates themselves.

And then what's significant in that is that the federal regulations set out a process for the state to be advising CMS of what it's actually doing as far as fluctuation in rates. And that's in -- Section 447.255 requires that with assurances about whether or not access is still being provided -- and this is something that's being done on an annual basis -- that the Medicaid agency must submit the amount by which the estimated average rate increased or decreased relative to the average payment rate and in fact for each type of provider for the immediately preceding rate period.

And going forward, I know that in the preliminary injunction that the proposed CMS regulations that are not in effect yet have been submitted that would give further definition to this reporting process and what's expected of states in the future, but we pointed out that -- and the department does annual reports, and in each of those annual

reports there's an appendix that has indicated the changes, including each percent -- you know, like the 2008 changes in the percentage of rates. Those were in the annual reports, and those are certainly made available to CMS.

So the idea that the department is hiding what they have done as far as applying these factors from CMS so that the Secretary couldn't come back and say, we think you have a problem, you know, it just doesn't square with the regulations or with what has been done -- the reporting that has been done.

On the Long Term Care case I would just go back and point the Court to one sentence in that case at page 54. This is where it starts talking about 13(A) and it says after the -- it is a paragraph that starts, "broadly speaking". The last sentence in that paragraph says that the Commonwealth, the state of Massachusetts, assumes that if Long Term's members are providing nursing facility services such numbers represented by Long Term are entitled to sue as providers in federal court to enjoin violations of Section 13(A) that affect their interests.

Therefore, the State of Massachusetts didn't raise the issue of whether or not 13(A) provided a cause of action. They assumed that it would if they

were providers. That's why Long Term Care didn't really decide that question.

THE COURT: Well, I think everybody agrees it's not, strictly speaking, a law school holding of the case. Were you briefing it in an appropriate law school class you would not write, holding, 13(A) provides -- but the question is does it? And you're saying everybody thinks so, but it doesn't.

MS. SMITH: What we are pointing out is --

THE COURT: Everybody in the First Circuit thinks so, but it doesn't.

MS. SMITH: They've never been asked to address that question.

THE COURT: I understand. No. That's not true. They've addressed the question. It just isn't, strictly speaking, a holding as a law student and a lawyer and a judge would understand the term holding. It's a term of art. As a term of art, you're quite correct, it is not a holding of the case.

Okay. Now the question remains, is there a cause of action created? Well, has anybody ever spoken about the issue, discussed it? Yes. As a matter of fact, the First Circuit has discussed it. Gee, what did they say? They said it does. Is that a holding binding on me? No. Is it persuasive that

they think it does? A little bit. Could I say, well, it may be what you think, but it's not a holding and I think differently? Yes, I could do that. But I think Mr. MacDonald's point was, but it might be persuasive.

MS. SMITH: We would respectfully submit that if they went through the analysis and were asked to really determine whether there are rights they may not have --

THE COURT: Well, do you disagree that you are obligated to give notice and discuss what you plan to do with regard to rates and the methodology and reason why and then publish the rates and explain the methodology behind them? If you're required to do all of that and you didn't do it -- I know you say we did, but if you didn't do that, don't you agree that there would be a cause of action under 13(A) by a hospital to come forward and say, wait a minute, the procedural requirements have not been followed. I at least get to come into court and say that, don't I?

MS. SMITH: The Second and Third Circuits have said no.

THE COURT: I understand. So you disagree?

MS. SMITH: We claim there's not a cause of action for it. They could certainly have -- as they have done -- raised it with CMS. The hospitals have

raised these issues with CMS, came back and asked us what we did. So there's certainly notice to the Secretary. And the process -- the agreement between the state and the federal government is that CMS can certainly come back and tell the state you need to do something else.

THE COURT: And if there's some unholy alliance between the state and the Secretary, too bad for the providers?

MS. SMITH: If CMS is satisfied that the notice we gave was adequate --

THE COURT: No. I'm saying assume that the Secretary and the department on a federal level and the Secretary and the department on a state level over a cup of coffee decide, you know what, pure fiscal, that's the only concern, good enough, we're going to wink at that and let that go. The hospitals have no recourse. The enforcer has decided that that's okay, and there's no recourse by a provider? There's nowhere they can go? There's no court that that can be heard in to say that's not what Congress provided in the law, that's not the law of the land and the parties are not observing the law, and there's no court in this land that can do anything about it? That just seems to be an odd perception.

MS. SMITH: There is not always a causative action for everything.

THE COURT: Well, Marvin versus Madison kind of suggested that there should be.

MS. SMITH: There is a process. The providers would have other avenues to try and address this. They can certainly lobby with the legislatures, which they do, for a different --

THE COURT: But how does that help? The legislature says, yes, consider these other factors, and the administrations on both the federal and state level say, well, thanks for your advice, but I don't think so.

MS. SMITH: I'm hesitating because I know that when -- and the CMS process in regard to state plan amendments -- and I'm hesitating because I don't know if there are other ways to do that, but the providers can intervene in the process at CMS where a state plan amendment is disapproved. If the state appeals with CMS then --

THE COURT: No. I'm just talking about just a rank, blank failure, refusal to comply with the law as written. We're just not going to do that. We are not going to consider the effects on the delivery of Medicaid services in determining this rate setting.

We're just not going to do it. We're not doing it. We didn't do it. We're proud of the fact that we didn't do it. And you're saying hospitals have no place to go because the regulator and the state have winked at each other and decided that's okay.

You seem to be saying, well, there's still no cause of action. There's no Ex parte Young. There's no nothing. Too bad.

Because Congress would be upset about that theoretically, right? Congress would say, these aren't letters to our friends. These are laws. We expect people to comply with them. If they don't comply with them, there's a mechanism. You get prosecuted. You get sued. You go to court. The courts establish what the problem is. The courts issue a remedy. It gets enforced by the executive. There's a system. It works. But it doesn't work if there's no place to go and nobody has standing.

MS. SMITH: Where Congress has designated CMS, the Secretary, as being the enforcing mechanism and the remedy, then that is the sole remedy that Congress set out.

THE COURT: You may be right. It just strikes me as an odd perception.

All right. I promised Mr. Chapman I would

give him -- unless you're -- are you done?

MS. SMITH: No. That was my last point.

THE COURT: Mr. Chapman, I assume you disagree.

MR. CHAPMAN: Thank you, your Honor. I just want to make clear that although I talked about 13(A), the irreparable harm argument about decision makers having the necessary information to come to the right decision in the first instance applies to 30(A). And the reason it applies to 30(A) is that it's our position that 30(A) has a procedural component to it.

And if you look at part of 30(A) -- Attorney Smith talked about 30(A) was enacted to give the states more flexibility and to ensure or safeguard against unnecessary utilization, and it does say that. It also talks about unnecessary utilization that are consistent with efficiency, economy, quality of care, and sufficient to enlist enough providers to service the Medicaid population.

Now, how's the state going to get that information? CMS -- and this is referred to on page 33 of our opening memo in support of the preliminary injunction. CMS takes the position that the state needs to get the input of Medicaid beneficiaries and Medicaid stakeholders, i.e., hospitals, to ensure that

a rate change will still permit the necessary services to be provided.

So, yes, indeed our irreparable harm argument applies to 30(A), as well.

THE COURT: Great. Thank you. Anything else? Attorney Smith? Attorney MacDonald? Attorney O'Connell? All right. Thank you very much. I appreciate it.

(Conclusion of Hearing at 11:20 a.m.)

C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 12-21-11

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